No. 3062.

United States Circuit Court of Appeals

For the Ninth Circuit

EMMETT IRRIGATION DISTRICT, a municipal corporation, W. H. SHANE, N. B. BARNES and E. J. REYNOLDS, as Directors, and R. B. SHAW, as Treasurer of the Emmett Irrigation District, Appellants,

vs.

J. PAUL THOMPSON, A. N. GAEBLER, HELEN M. CONRAD, S. H. HUDSON, HENRY M. WILLIAMS, CHARLOTTE H. SHIPMAN, F. W. HORTON, MARY C. WADDELL, J. WILLIS GARDNER, LINCOLN UNIVERSITY, a corporation, CHESTER COUNTY TRUST COMPANY, a corporation, NATIONAL BANK OF OXFORD, a corporation, for themselves and all other bondholders of Emmett Irrigation District, similarly situated, Appellees.

BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

J. M. THOMPSON,
Residence Caldwell, Idaho.
FREMONT WOOD AND
DEAN DRISCOLL,
Solicitors for Appellants,
Residence Boise, Idaho.

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BRIEF OF APPELLANTS

Upon Appeal from the District Court of the United States, District of Idaho, Southern Division.

STATEMENT OF THE CASE.

This is an appeal from final decree in a suit, originally instituted on the equity side of the District Court of the United States for the District of Idaho, Southern Division, by J. Paul Thompson, as sole plaintiff, against the defendants and appellants, Em-

mett Irrigation District, its Board of Directors and Treasurer.

The principal relief sought was to have adjudged valid certain bonds in the amount of $101,000.00 and coupons thereto belonging issued by defendant District and alleged to be held by plaintiff, and to have the interest or bond fund in the hands of the defendant Treasurer applied to the payment of the coupons. All of the bonds in question constitute a part of the first issue of series number one, the first issue constituting the entire series, and the whole amount of the series and issue being the total sum of $1,100,000.00. A copy of one of the bonds and one of the coupons appears on pages 121-125 of the transcript, and except as to numbers, amounts and dates of maturity all the bonds and coupons are identical (Transcript page 120).

The cause was previously before this Court on plaintiff's appeal from an order dismissing the bill for want of equitable jurisdiction, which order was reversed and the cause sent back for further proceedings on the equity side of the court. (227 Federal, 560.)

By stipulation (Transcript pages 78-80) an order (Transcript page 81) and subsequent amendments to the bill (Transcript page 82), A. N. Gaebler, Helen M. Conrad, F. H. Hudson, Henry L. Williams, Charlotte H. Shipman, F. W. Horton, Mary C. Waddell, J. Willis Gardner, Chester County Trust Company, a corporation, Lincoln University, a corporation, and the National Bank of Oxford, a corporation, were thereafter made co-plaintiffs, with the

same standing as if they had been plaintiffs from the institution of the action.

The original suit was brought, as alleged in the original complaint by plaintiff, "for himself and all other holders of bonds of said District who may desire to join in this proceeding and pay their proper proportion of the costs thereof" (Transcript page 24), and on the bringing in of the new parties plaintiff the title of the case was changed to include the names of any plaintiffs, and by inserting after the names of the plaintiffs the following, "for these and all other bondholders of the Emmett Irrigation District similarly situated" (Transcript page 79).

The cause came on for trial on the merits on April 16, 1917, in open court, before the Honorable F. S. Dietrich (Transcript page 117). The decision of the court is found on pages 95 to 114 of the transcript, and pursuant to said decision decree was entered on July 16, 1917 (Transcript page 115), adjudging all the outstanding bonds of the said series and issue, and the coupons thereto belonging, legal and valid obligations of the defendant district, irrespective of whether the same were held by the parties to the action or other persons similarly situated, or otherwise, and, secondly, enjoining the defendant Directors and Treasurer from using the moneys in the bond or interest fund for any other purpose than the payment of principal and interest on the bonds, and directing that they apply the money now in the fund to the payment of interest coupons upon presentation, whether the same be held by parties to the action or other persons.

There is little dispute in the main on the facts of the case. It is admitted that the defendant District is an irrigation district, and as such a municipal or quasi-municipal corporation, organized September 13, 1910, under the general laws of Idaho; that the defendants, W. H. Shane, N. B. Barnes and E. J. Reynolds, were at the time of the trial its Directors, and the defendant, R. B. Shaw, its Treasurer; that regular and valid proceedings were taken by the District authorizing the issuance of the bonds hereinbefore described in the sum of $1,100,000.00; and that on the 14th day of February in the year 1911 judgment was made and entered in the Supreme Court of the State of Idaho (19 Idaho 332), affirming a decree of the District Court of the Seventh Judicial District of the State of Idaho, in and for the County of Canyon, whereby all the proceedings had and taken for the organization of the District and for the authorization of the bond issue were confirmed and approved and validated. There is, in fact, no error assigned by appellants as to any matter antedating the *authorization* of the bonds to which point, and no further, they are validated by the aforesaid decree. On the contrary, appellants' assignments of error relate entirely to the manner and condition and the consideration for the issuance and sale, all of which transpired after the original decree of confirmation.

Proper understanding of the points made in that connection, however, requires a brief survey of the matters leading up to the sale and the District's situation at the time thereof. The irrigation works and

system hereinafter referred to as transferred to the District as part of the consideration for the bonds, and which lie within the District, were constructed by a company known as the Canyon Canal Company, under contract with the State of Idaho, pursuant to the provisions of the Carey Act (Transcript page 193). At that time the lands to be irrigated were part of the public domain, and were segregated pursuant to the provisions of the said Carey Act. At the time of the original construction, there were about 18,000 or 19,000 acres in all, and 4,000 acres were added thereafter (Transcript page 194). This company sold contracts for water rights to settlers and prospective settlers for the land (Transcript page 194). The Emmett Bench Canal Company was the settlers' holding company under the Carey Act (Transcript page 176). On August 15, 1911, the Canyon Canal Company transferred by quit-claim deed the entire system to the said Emmett Bench Canal Company, subject to all legal charges, liens and claims against the same (Transcript pages 199-200), and on the same day the Emmett Bench Canal Company transferred the same, subject to the same provisions as to charges and liens, by quit-claim deed to the defendant District. The District on that day took possession of the system, and has operated it ever since (Transcript pages 199-200). In the meantime, the Board of Directors of the District had taken the necessary and proper preliminary proceedings, and given the proper notice, for the sale of the entire series and issue of the bonds of the District (Transcript page 119), but the same remaining un-

sold on September 12, 1911, the Board entered into a contract with J. J. Corkill & Company, of Chicago, Illinois, for the sale of the entire series and issue, which contract was introduced in evidence (Transcript page 127), and appears in full as Exhibit "A" to the defendants' answer (Transcript page 60). In substance, this contract provides that the entire series and issue of bonds shall be placed with the Ft. Dearborn Trust & Savings Bank of Chicago, Illinois, as depositary, a large portion, through the efforts of Corkill & Company, to be exchanged for the outstanding obligations of the Canyon Canal Company, a similar portion to be delivered to Corkill & Company for cash, and a portion to be delivered to Corkill & Company as commission.

There were certain contracts supplemental to this original contract, one of which appears on pages 131 to 148 of the transcript, but none of these supplemental contracts are thought to have any bearing on the points presented in this argument. However, much of the question concerning the bonds does hinge on the contract of September 12, 1911, and a more detailed analysis is therefore necessary.

Bearing in mind that the properties of the Canyon Canal Company had been previously transferred to the District, as hereinbefore shown, it will be noticed from recitals of the contract (Trans. page 61) that "The District desires to purchase the property of the said Canyon Canal Company, and the said party of the second part (Corkill & Company) are able to sell and deliver to the District the said properties," then follows a recital of the various outstanding obliga-

tions to which the properties of the said Canyon Canal Company were subject, of which the following is a tabulation (Transcript pages 61-62-63):

$170,000.00	(principal) First Mortgage Gold Bonds.
100,000.00	Second Mortgage Collateral Trust Bonds, dated July 1, 1906.
100,000.00	Notes secured by water contracts, notes dated December 15, 1908.
200,000.00	Notes, dated May 1, 1909.
$570,000.00	Total.

Coming to the actual agreement (Transcript page 64), Corkill & Company agreed to use their best efforts with the holders of the Canyon Canal Company obligations to secure the exchange of the same for District bonds, when the District should deposit the same with the depositary, to cause the canal system to be conveyed to the District (which has already been done, but not by Corkill & Company's efforts), and also at the time when the bonds should be deposited to assign or cause to be assigned "the unsecured claim or claims against the Canal Company held by Trowbridge & Niver Company" (Transcript page 65), and cause to be released to the District, when the transfer of the Canyon Canal Company obligations had been completed, all the water contracts and cash held by trustees for the creditors of the Canyon Canal Company, and transfer to the District all the right, title and interest of the Trowbridge & Niver Company in and to any stock of the Canal Company (Transcript pages 66-67). Corkill

& Company further agreed (Transcript, Sec. 6, page 69) to purchase $280,000.00 in amount in District bonds for cash.

On the other hand, the District obligated itself to deposit the entire series and issue of bonds with the depositary (Transcript, Sec. 4, page 67), and instruct the depositary to deliver the same as follows (Transcript pages 67-68-69):

(a) $470,000.00 in amount for equal amount at par of Canyon Canal Company bonds, dated June 15, 1905, or notes dated December 15, 1908, or notes dated May 1, 1909.

(b) $130,000.00 par in amount for $100,000.00 in amount of second and collateral trust bonds of the Canyon Canal Company, together with $30,000.00 accrued interest thereon.

(c) $220,000.00 par value in amount of the District bonds to be delivered to Corkill & Company upon the performance by Corkill & Company of the obligations set forth in Section 2 (page 65 of the transcript), which bonds were to be held by the depositary as security for the performance by Corkill & Company of the terms and conditions of the contract (Transcript, Sec. C, page 69), and delivered to Corkill & Company, as appears on page 70 of the transcript, in amounts equalling 25 per cent of the bonds of the district exchanged for Canyon Canal

Company obligations, and 25 per cent of the District bonds paid for by Corkill & Company in cash.

(d) $280,000.00 in amount, being the remainder of the bonds, to be delivered to Corkill & Company for cash in stipulated installments, as set forth in Sec. 6, pages 69-70 of the transcript.

It will be noted that provision is thus made for the disposition of the entire issue of $1,100,000.00, and, on the other hand, for the retirement of all the obligations of the Canyon Canal Company, secured or unsecured. The performance had under the terms of the contract is shown almost entirely by the deposition of Ernest C. Glenny, trust officer of the Fort Dearborn Trust & Savings Bank, the Depositary (T. pp. 127-157), from which it appears that $800,000.00 of the District's bonds were received by the Depositary about January 5th, 1912, and the remaining $300,000 about February 29th, 1912 (P. 127 T.). The disposition of the bonds made by the Depositary may be conveniently tabulated, as follows:

$496,000.00 for Canyon Canal Company bonds, dated June 15th, 1905, or notes dated Dec. 15, 1908, or notes dated May 1st, 1909, pursuant to subdivision (a) of section 5 of the original contract (T. pp. 67-68 and 128);

$130,000.00 in amount, for $100,000.00 of collateral trust bonds of the Canyon Canal Company and $30,000.00 for account interest (T. p. 128),

pursuant to section 5 (b) of the original contract (T. p. 68);

$175,000.00 in amount to Corkill & Company (approximately computed from p. 128 Trans.), pursuant to the provisions of section 5 (c) of the original contract (T. pp. 69-70);

$148,900.00 for cash (T. p. 128) under the provisions of paragraph 5 (d) of section 6 of the original contract (T. pp. 69-70).

Mr. Glenny gives as the total amount delivered, $897,600.00 (T. p. 128), and says in addition that $25,000.00 in amount were returned to the District (T. p. 129), leaving $177,400.00 in amount in the Depositary's possession.

This leaves outstanding of the total issue of bonds, $897,600.

Of the interest payments following the issuance of the bonds, the January 1st, 1912, July 1st, 1912, and January 1st, 1913, payments were paid by funds furnished by Corkill & Company, and the July 1st, 1913, by funds received from the District (Glenny, p. 156 T.), and the cash for this payment was raised not by levy and assessment, but by transfer from the construction fund of moneys which had been originally received from the Trustees for creditors of the Canyon Canal Company under the District's original contract with Corkill & Company (T. pp. 208-209). The only assessment ever made by the District for the payment of interest on the bonds was in the fall of 1913 (T. p. 209). The District did make a levy at that time (T. pp. 20 and 38), and

still has on hand the fund derived therefrom, nothing having been paid out from it, and the fund totals at the present time practically $8,000.00 (T. p. 157).

It is admitted that the coupons maturing January 1st, 1914, and thereafter, have not been paid in any manner.

From the entire record herein it is impossible to determine what bonds were issued to any particular person or for any particular purpose. In other words, no bonds can be identified from the present evidence. The depositary kept no such record (T. p. 156), nor any record sufficient to identify any particular bond (T. p. 155), and the trust officer, acting for the Depositary, refused to produce even such record as was kept (T. p. 155). The District kept none, could get none from the Depositary, and has no information to who the owners or holders of the bonds are, aside from the plaintiffs in this suit (T. pp. 201-202), and the president of the District was told by the Depositary that it could not be had without Mr. Corkill's consent, and Mr. Corkill informed him that it was none of his business (T. p. 202).

It also appears from the testimony of Edmond Seymour (pp. 181-193 T.) that the present suit is maintained by a Bondholders Committee (T. p. 185) and that all the plaintiffs bonds are deposited with the Committee among the other (T. p. 185); that the Committee is composed of Edmond Seymour, Adolph N. Gaebler, J. Paul Thompson and John R. Morrow; that the New York Trust Company is the Depositary for the bonds turned over to the Committee (T. pp. 181-182). The amount of the out-

standing bonds in the hand of the Committee is $728,100.00 (T. p. 185), all of which bonds were deposited with the Committee under a Bondholders' agreement, dated October 24, 1914, whereby the bonds were deposited with the New York Trust Company, subject to the order of the Committee, and of which the Committee was to be considered as the owner in law and in equity, for the purposes of the agreement and the enforcement of all the rights, title and interest of the original depositors therein, instituting all such suits and proceedings in equity or law, or otherwise as might be expedient and proper (T. pp. 183-185).

Mr. Seymour, as chairman of the committee, testified that their depositary had a record, open to the Committee's inspection of the bonds deposited with the Trust Company (T. pp. 182 and 188), but declined to furnish the District with such information (T. pp. 183 and 193).

In addition, it should be noticed that but one bond, being numbered D-298, was offered or received in evidence (T. pp. 120-121), and that counsel for plaintiffs offered to produce any other bonds of actual plaintiffs in the case for examination, but stated that he did not desire to leave the bonds or put them in as exhibits (T. p. 186). And the only coupons introduced in evidence were those belonging to the bonds of the plaintiff Gaebler (T. p. 186).

The defendants raised the objection in paragraph 13 of their answer (T. p. 56), that the plaintiffs' complaint was defective for want of necessary and indispensable parties, namely, other holders of the

outstanding bonds of the District, and, on the trial of the cause, preparatory to entering on the defense, moved that either the bill be dismissed for want of necessary and indispensable parties or that other necessary and indispensable parties be brought in, pursuant to Equity Rule 43, which motion was by the Court overruled (T. pp. 186-187), with leave to renew the same after hearing defendants' evidence. And, upon the renewal at the close of the evidence, was renewed and taken under advisement by the Court and decided adversely, by the decree entered in the cause (T. p. 210).

Interrogatories for discovery, pursuant to Equity Rule 58, were submitted to all plaintiffs on August 17, 1916, long prior to the trial of the cause (T. pp. 91-95), and it was admitted by counsel for plaintiff that the original plaintiff, J. Paul Thompson and also Henry M. Williams had not, at the close of the trial of said cause, filed any answer or response thereto (T. p. 211). Nor was any evidence introduced whatever in support of the bill as to the two plaintiffs, who are, nevertheless, given relief in the decree.

SPECIFICATIONS OF ERROR.

The appellants specify the following errors relied upon:

Group 1 (Page 217 Transc.)

I.

The court erred in holding and decreeing that the bonds of defendant District alleged to be owned and held by the plaintiffs, J. Paul Thompson and Henry

M. Williams, are legal, valid obligations of defendant District, for the reasons that:

(a) Neither of said plaintiffs, J. Paul Thompson or Henry M. Williams, at any time filed any answer whatsoever to interrogatories for discovery filed by defendants in said court and cause, on the 17th day of August, 1916, for discovery by said plaintiffs, in accordance with the 58th Rule of Practice for courts of equity of the United States, promulgated by the Supreme Court of the United States November 4, 1912.

(b) In that no evidence whatever was introduced at the trial of said cause, nor admissions made at such trial, or in the pleadings of said cause, or elsewhere, in support of the allegations of plaintiffs' complaint as amended, so far as the same refers to said plaintiffs, Thompson and Williams, or showing said plaintiffs entitled to any relief, or supporting said decree or any part thereof, in any manner, so far as the same affects said plaintiffs, J. Paul Thompson and Henry M. Williams.

II.

The Court erred in holding and decreeing that the said defendants, and each of them, and their successors in office, be enjoined and restrained from diverting or otherwise applying or using the moneys collected for or hereafter paid into the bond fund, created or required by law to be created, to purposes other than the payment of principal and interest on the bonds of the said plaintiffs, Thompson and Williams among others, for the reasons set forth in sub-

divisions (a) and (b) of the first assignment of error herein.

III.

The Court erred in holding and decreeing that said defendants be ordered and directed, so far as the matter comes within their official duties, to apply the money now in said bond fund, or that may hereafter be paid into said fund, under the tax levy of the 22d day of October, 1913, to the payment of any of the coupons originally attached or belonging to the bonds of the said plaintiffs, Thompson and Williams, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

IV.

The Court erred in decreeing to the said plaintiffs, J Paul Thompson and Henry M. Williams, any relief whatsoever, for the reasons set forth in subdivisions (a) and (b) of the first assignment of error herein.

GROUP 2 (Page 219 Transc.)

VI.

The Court erred in overruling and denying defendants' motion, at the trial of said cause, that all of the holders of outstanding bonds of said defendant District be brought in as parties to this action.

VII.

The Court erred in proceeding with the trial, and the hearing of said cause and the entering of said or any decree in said cause in favor of said plaintiffs, or any of them, or any other bondholders similarly

situated, in that the plaintiffs' bill as amended is defective for want of and by reason of non-joinder of parties, to-wit, holders of other outstanding bonds of series one and issue one of said defendant District.

VIII.

The Court erred in holding and decreeing that bonds of said defendant District alleged to be held and owned by persons other than plaintiffs to this action are legal and valid obligations of said district, for the reason that said holders are not parties to the action.

IX.

The Court erred in holding and decreeing that the defendants be perpetually restrained and enjoined from diverting or otherwise appropriating, applying or using for any purposes other than the payment of principal and interest as the same become due, on said bonds or coupons, the money collected for or hereafter paid into the bond fund, created, or required by law to be created for the payment of the principal and interest on the said bonds, so far as the same affects bonds held by persons other than the plaintiffs in this action, for the reason that such holders are not parties to the action.

X.

The Court erred in holding and decreeing that the said defendants, and each of them, be ordered and directed, so far as the matter comes within their official duties, to apply the money now in said bond fund or that may hereafter be paid into the bond

fund, under the tax levied on the 22d day of October, 1913, to the payment of any interest coupons, originally attached or belonging to the bonds outstanding and held by persons other than the plaintiffs in said action, for the reason that said holders are not parties to the action.

XI.

The Court erred in making or entering any decree with respect to bonds or coupons owned or held by persons other than the plaintiffs in the action, for the reason that said owners or holders are not parties to this action.

(Transcript pages 219-220.)

GROUP 3 (Page 221 Transc.)

XIV.

The Court erred in holding and decreeing that bonds delivered to Corkill & Company under subdivision (c) of paragraph five (Transcript page 69), on page seven of the original contract of September 12, 1911, copy of which was introduced in evidence and attached to defendants' answer as Exhibit "A" thereof (Transcript page 60), said subdivision reading as follows:

"Upon the execution in favor of the District of the above transfers and assignments mentioned above in Section 2 hereof, and upon the deposit of said papers with the depositary, the parties of the second part shall be entitled to receive $220,000.00 par value in amount of the said bonds with the January 1st, 1912, and all subsequent coupons attached

thereto, but the said $220,000.00 par value in amount of bonds shall be held by the depositary as security for the compliance of the parties of the second part with the terms of this contract and delivered to them as hereinafter set forth."

Are valid and legal obligations of said district, for the reason that the same were issued to said Corkill & Company as commission for services, and not for cash or canals or works or for any other consideration authorized by law.

XV.

The Court erred in holding and decreeing that the defendants, and each of them, and their successors in office, be restrained and enjoined from diverting and using money collected for or hereafter paid into the bond fund created, or required by law to be created for the payment of principal and interest on said bonds, to purposes other than the payment of principal and interest on the outstanding bonds of said District mentioned in said decree, including bonds and coupons delivered to Corkill & Company under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof; said subdivision (c) of said paragraph reading as set forth in the last preceding assignment of error, for the reason that the said bonds and coupons delivered to Corkill & Company under said paragraph were issued to them as commission for services, and not for cash, or canals, or works, or any other consideration authorized by law.

XVI.

The Court erred in holding and decreeing that said defendants, and each of them, be ordered and directed, so far as the matter comes within their official duties, to apply money now in said bond fund, or that may hereafter be paid into said bond fund, under the tax levy of the 22d day of October, 1913, to the payment of any of the coupons belonging or attached to bonds delivered to Corkill & Company, under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof, copy of which is set forth on assignment of error Number XIV herein, for the reason that said bonds and coupons were issued to said Corkill & Company as commission for services, and not for cash, or canals, or works, or any other consideration authorized by law.

XVII.

The Court erred in holding and decreeing any relief in favor of the holders of bonds and coupons delivered to Corkill & Company under subdivision (c) of paragraph five of the contract of September 12, 1911, attached to defendants' answer as Exhibit "A" thereof, copy of which subdivision of said paragraph five is set forth in the XIV assignment of error herein, for the reason that the same were issued to said Corkill & Company for services rendered and not for cash, or canals or works, or for any other consideration authorized by law.

(Transcript pages 221-223.)

Group 4.

XVIII.

The Court erred in holding and decreeing that any outstanding bonds of the District are valid and legal obligations of the District for the reasons that:

(a) Said bonds, other than those sold and delivered for cash, were not issued for canals or works or cash at par, or for any other consideration authorized by law (Transcript page 223).

(c) Said bonds do not mature at the periods or intervals prescribed by law.

XIX.

The Court erred in holding and decreeing that the defendants, and each of them and their successors in office, be perpetuallly enjoined and restrained from diverting or otherwise appropriating, applying or using for any purpose other than the payment of principal or interest as the same becomes due according to the tenor of said bonds, money collected for or hereafter paid into the bond fund created or required by law to be created for the payment of principal and interest on said bonds, for the reasons set forth in subdivisions (a) and (c) of the XVIII assignment of error herein.

XX.

The Court erred in holding and decreeing that the said defendants, and each of them, so far as the matter comes within their official duties, apply the money now in said bond fund, or that may hereafter be paid into said bond fund, under the tax levied on the

22d day of October, 1913, to the payment of any of the outstanding interest coupons belonging to or attached to the outstanding bonds of said district, for the reasons set forth in subdivisions (a) and (c) of the XVIII assignment of error herein.

XXI.

The Court erred in holding and decreeing any relief to the plaintiffs, or any of them, or any person similarly situated, for the reasons set forth in subdivisions (a) and (c) of the XVIII assignment of error herein.

(Transcript pages 224-225.)

ARGUMENT.

The assignments of error contained in Group 3, being the XIV, XV, XVI and XVII specifications, and the assignment contained in Subdivision (a) of each error specified in Group 4 herein, the XVIII, XIX, XX and XXI, can be well considered together. They present our contention that the bonds, other than those sold and delivered for cash, were not issued for canals or works or cash at par, and that any other disposition is illegal and renders the bonds invalid.

It is apparent from the foregoing statement that, aside from the bonds issued for cash, all the bonds outstanding were delivered for one of two purposes, first, for debts or claims against the Canyon Canal Company; second, for commissions to Corkill & Company for their services, the latter being the $175,-000.00 par delivered pursuant to the provisions of

Section 5-C of the original contract (Transcript pages 69-70).

It is not open to dispute, that irrigation district bonds may be issued only for the purpose provided by statute, viz: for cash at par and accrued interest, pursuant to Section 2404, Idaho Revised Codes, which reads, so far as material here: "The Board may sell said bonds from time to time in such quantities as may be necessary and most advantageous to raise money for the construction of said canals and works, the acquisition of said property and rights, and otherwise carry out the purposes of this Title * * * ;" or they may be used directly for the purchase of works, under the provisions of Section 2386, Idaho Revised Codes, reading, in part, as follows: "Said Board shall also have the right to acquire either by purchase, condemnation or other legal means all lands and water rights and other property necessary for the construction, use, supply, maintenance, repair and improvement of said canal or canals and works, including canals and works constructed and being constructed by private owners, lands for reservoirs for the storage of needful water, and all necessary appurtenances. In case of purchase, the bonds of the District hereinafter provided for may be used to their par value in payment."

No other method or purpose was provided in the statutes of the State at the time these bonds were sold, and it was then and is now expressly provided in Section 2392, Idaho Revised Codes, as follows: "The Board of Directors or other officers of the District shall have no power to incur any debt or liabil-

ity whatever, either by issuing bonds or otherwise, in excess of the express provisions of this Title, and any debt or liability incurred in excess of such express provisions shall be and remain absolutely void * * * ."

There is no Idaho case bearing directly on the point, but the numerous California cases construing almost identical sections of the Wright Act of California seem to be conclusive.

In Hughson v. Crane (Cal.) 47 Pac. 120-121, bonds had been issued directly in payment of the amount due on a construction contract, and also in payment of salaries and certain other obligations of the District. After referring to section 15 of the California Irrigation Act, which corresponds to Section 2396 of the Idaho Revised Codes and to Sections 16 and 12 of the California Act, corresponding respectively to Sections 2204 and 2386 of the Idaho Revised Codes, hereinbefore set forth, the Court say:

> "These are the only provisions in the act for any disposition by the directors of the bonds of the district; and it follows that the only mode in which they can exercise their power of disposing of the bonds so that they may become valid obligations against the district is either to exchange them for property at their par value, or sell them for money in the open market, under the restrictions and limitations given in Section 16, at not less than 90 per cent of their face value. The express provision giving to the board power to exchange them for certain property at their par value excludes the

right of the board to exchange them for any other purpose, or to dispose of them in any other manner than by the sale authorized by Section 16."

In Stimson v. Alessandro Irr. District (Cal.) 67 Pac. 496, bonds had been issued in exchange for rights to the use of water from a canal not owned by the district. These were held void.

In Leeman v. Perris Irrigation District (Cal.) 74 Pac. 24, bonds were issued in payment of maintenance or general expense warrants; and in Ham v. Grapeland Irrigation District (Cal.) 158 Pac. 207-210, they had been issued for groceries and supplies. In both cases the bonds were held void, as having been issued for a purpose and consideration other than the two limited and authorized by statute.

As to the bonds used for the payment of outstanding obligations of the Canyon Canal Company, it will be contended that this was a purchase of property. In reply, attention is called to the fact (as particularly set forth in the statement herein) that the entire property had been conveyed on August 15, 1911, to the District, on which day the District took possession, and has operated it ever since (Transcript pages 199-200), which was prior even to the time of making the Corkill contract. True, the District held the property subject to valid or legal claims against it, but it is no place shown that any of the claims for which these bonds were exchanged were legal or valid or that they constituted any lien upon the District's property. It is also submitted, assuming that

these claims were valid liens, that the payment thereof with bonds of the District after acquisition of title by the District, is not a purchase of property within the contemplation of the statutes and authorities cited.

As to the bonds delivered to Corkill & Company, which appellants claim were commission bonds, and nothing more, it will be contended that the consideration therefor was not the services of Corkill & Company, but the release of the Trowbridge & Niver unsecured claim, referred to in Section 2 of the contract (Transcript page 65). It is submitted that the contract will not bear this construction. This claim was to be released on deposit of the whole series of bonds with the depositary (Transcript page 65, Section 2), which was prior to the delivery of any bonds, and it is no place provided in the contract that any of the bonds were to be issued to any person in consideration of or in payment therefor. This claim is not even mentioned in the recitals of the contract (Transcript pages 61-64) specifying the obligations of the Canyon Canal Company for which bonds were to be exchanged.

If it were true, however, that this claim had been the actual consideration for the bonds issued to Corkill & Company, the objection that such bonds had been issued for an unlawful purpose would still remain, as the claim did not even purport to be a lien against the property of the District.

We submit that the contract is capable of only one construction in its application to this item of bonds, and that is that they were to be delivered to Corkill

& Company without consideration and as compensation for effecting the exchange of new bonds for the old issue and the sale for cash of the $280,000.00 of bonds set aside to be sold only for cash at par.

This apparently is the construction placed upon the contract by Corkill & Company and by the Trustee, because immediately upon effecting the exchange the Trustee delivered to Corkill & Company approximately $150,000.00 of the commission, or bonus, bonds (Trans. p. 154). Under the contract of September 12, 1912, the Trust officer of the Depositary, testified that Corkill & Company paid in $30,000.00, but that the Trust Company actually delivered to him $37,500.00 of the bonds (Trans. p. 157). There is no pretense that this excess of $7500.00 had anything to do with procuring the title to any portion of the canal or works, or property of any description, or that the District received anything therefor, except the services of Corkill & Company in affecting the sale of $30,000.00 par value of the bonds.

We think the contract should be given its plain manifest cosntruction, and that is that the parties to it were trying to escape the plain provisions of the statute, which require that the bonds should only be sold at par and accrued interest, or exchanged for property upon the same basis. To place a different construction upon these provisions of the contract involves an extended journey into the realms of speculation, which we submit is not warranted when examining the contract in the light of the surroundings and conditions under which it was executed.

THE BONDS DO NOT MATURE AT THE PERIODS PRESCRIBED BY LAW.

Subdivision (c) of the fourth group of errors specified raises the contention that the bonds do not mature at the periods or intervals prescribed by law. Section 2397 of the Idaho Revised Codes, so far as the same is material here, provides:

"The bonds authorized by any vote shall be designated as a series and the series shall be numbered consecutively as authorized. The portion of the bonds of a series sold at any time shall be designated as an issue, and each issue shall be numbered in its order. The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due, and they shall be designated as eleven year bonds, twelve year bonds, etc. They shall be negotiable in form and payable in money of the United States as follows, to-wit: At the expiration of eleven years from each issue, five per cent of the whole number of bonds of such issue; at the expiration of twelve years, six per cent; at the expiration of thirteen years, seven per cent; at the expiration of fourteen years, eight per cent; at the expiration of fifteen years, nine per cent; at the expiration of sixteen years, ten per cent; at the expiration of seventeen years, eleven per cent; at the expiration of eighteen years, thirteen per cent; at the expiration of nineteen years, fifteen per cent; at the expiration of twenty years, sixteen per cent: *Provided*, That such percentages may be changed sufficiently so that every bond shall be in an amount of one hundred dol-

lars or a multiple thereof, and the above provisions shall not be construed to require any single bond to fall due in partial payments. Interest coupons shall be attached thereto, and all bonds and coupons shall be dated on January first or July first next following the date of their authorization and they shall bear interest at a rate of not to exceed seven per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the place designated therein. Said bonds shall be each of the denomination of not less than one hundred dollars nor more than one thousand dollars, and shall be signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. Coupons attached to each bond shall be signed by the secretary. Said bonds shall express on their face that they were issued by the authority of this title, naming it, and shall also state the number of the issue of which said bonds are a part. The secretary and treasurer shall each keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser. In case the money raised by the sale of all the bonds is insufficient for the completion of the plans and works adopted, and additional bonds be not voted, it shall be the duty of the board of directors to provide for the completion of said plan by levy of assessment therefor, in the manner hereinafter provided. * * * "

It appears on the face of the bonds themselves (Transcript page 122), and by the testimony of

V. T. Craig (Transcript page 196), that the sixteen year bonds of this issue are $10,000.00 short of the amount required by statute, and the twenty year bonds are $10,000.00 in excess. This in effect extends the maturity of ten thousand dollars of the principal four years beyond the time designated by the statute for its payment and increases the amount of interest which must be paid $2400.00 beyond the statutory limitation; yet these particular bonds, representing this increased interest, are declared valid by the decree herein, including the remaining $175,000.00 represented by the same maturity and notwithstanding the fact that the $10,000.00 excess issued for the twentieth maturity cannot in any way be distinguished from the $175,000.00 which the law fixed as the maximum for such maturity.

It is also contended that the entire issue of bonds mature over a year prior to the time when they could lawfully do so under the statute. The bonds are all dated January 1, 1911, which is the proper date, as the foregoing Section 2397 of the Codes requires that they be dated on the first day of January following their authorization. It also requires, however, that the bonds mature, so many at the expiration of a certain period, "from each *issue*," and the word "*issue*" is defined in the preceding sentence of the same section (2397) as "the portion of the bonds of a series *sold* at any time." The negotiable instrument law of the State (Section 3648, Idaho Revised Codes) also provides: "Issue means the first delivery of an instrument complete in form to a person who takes it as a holder."

We submit that under these statutes the bonds were issued only when delivered by the depositary. But, assuming for the purpose of argument, that issue means delivery to the depositary rather than delivery to the actual purchaser, these bonds did not reach the depositary until January and February in the year 1912 (Tran. p. 127), which was over a year from their date, and as appears on the face of the bonds (Trans. p. 121) the maturities are all computed from the date of the bond thereby advancing the maturity of the whole issue a year under the period contemplated by statute.

The authorities are uniform that no municipal or public corporation has power to issue bonds payable at any time other than that fixed in the statute or ordinance by which the power to issue is delegated.

In Wright v. East Riverside Irrigation District (9 C. C. A.) 138 Fed. 313-322, bonds issued under the Wright Act of California were contested. The provisions of the Wright Act differed from those of the statutes of Idaho in that the California act required the bonds to be dated when issued, and the Idaho act requires them to be dated the 1st day of January or July following their authorization. And the California act only impliedly requires the maturities to date from the time of issuance. The Idaho statute requires this expressly. The bonds in that case bore date December 30, 1890. They were actuallly delivered on the 27th day of June, 1892. The court in its opinion, however, for the purpose of making the point, assume (p. 322) that the bonds were

"issued" at the latter date, namely, the date of their disposal, thereby making a case parallel to that at bar, and on that situation, say:

> "They equally failed to conform to those other essential provisions of the statute declaring that they shall bear date at the time of their issue and be payable in installments at the various times therein fixed. In that view they are antedated, the direct and necessary effect of which is to make them payable within a shorter time than is provided by statute for their payment, which provision is, as a matter of course, of the essence of the law and not a matter of mere form. In either event and in both cases the purchaser was appraised by the face of the bond itself and the law under which it purported to be issued of its invalidity."

In Stowell v. Realto Irr. District (Cal) 100 Pac. 248-251, the court say:

> "The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. 'There can be no doubt that it is within the power of a state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability.' Anthony v. County of Jasper, 101 U. S. 693, 25 L. Ed. 1005. Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter (People's Bank v. School District,

3 N. D. 496, 57 N. W. 787, 28 L. R. A. 642) or a longer term (Norton v. Town of Dyersburg, 127 U. S. 160, 8 Sup. Ct. 1111, 32 L. Ed. 85; Barnum v. Okoloma, 148 U. S. 393, 13 Sup. Ct. 638, 37 L. Ed. 495) than that authorized are invalid."

In People's Bank v. School District No. 52, 3 N. D. 496, 28 L. R. A. 642, it is said:

"It is elementary that power to issue such municipal securities is derived wholly from statute. The statute may prescribe the conditions on which such power shall be exercised. It may also declare what terms shall be embodied in the bonds it authorizes to be issued. The donee of the power must take it burdened with all statutory requirements, as well as with respect to the terms of the bonds to be issued as with regard to the conditions on which they may be issued. The statute authorizing defendant to issue bonds provides that they 'may be made payable in not less than ten nor more than twenty years from their date.' The bonds which were issued under this power were dated September 12, 1884, and were in terms payable September 1, 1894. They were therefore made payable in less than ten years from their date. We do not see how such a bond can be regarded as being authorized by the statute. There is no more power to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the mag-

nitude of the departure from the statutory requirement, it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days, on what principle can we draw it, at thirty days, or six months, or a year? Authority to issue bonds payable in not less than ten years from date is not authority to issue them payable in less than ten years. There is an eminent authority in favor of this view. Norton v. Dyersburg, Tenn., 127 U. S. 160, 32 L. Ed. 85; Barnum v. Okolona, 148 U. S. 398, 37 L. Ed. 495; Brownell v. Greenwich, 114 N. Y. 518, 4 L. R. A. 685; Hoag v. Greenwich, 133 N. Y. 152; Potter v. Greenwich, 92 N. Y. 663. In the case 148 U. S. and 37 L. Ed. the bonds were payable in from eleven to seventeen years from date. Under the statute the time of payment was not to extend beyond ten years from date. Therefore, as to some of the bonds, the violation of the statute was only to the extent of making them payable a year later than the statute prescribed; and yet these bonds were held void on this ground. The court did not indicate that the extent of the violation was at all material to the injury whether the law had been disregarded. Mr. Justice Shiras, in his opinion, says: 'Accordingly, if in the present instance, the legislature of Mississippi, in authorizing the town of Okolona to subscribe for stock in a railroad company, and to pay for the same by an issue of bonds, prescribed that

> such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds. * * * Our conclusion upon the whole case is that the town of Okolona had no power to issue the bonds in suit.' "

In Barnum v. Okolona, 148 U. S. 393, 13 S. C. R. 638, it is said that if the legislature in authorizing the town of Okolona to subscribe for stock in a railway company and to pay for the same by a bond issue, "prescribed that such bonds should not extend beyond ten years from the date of issuance, such limitation must be regarded as in the nature of a restriction on the power to issue bonds." Citing Norton v. Dyersburg, 127 U. S. 160, 8 S. C. R. 1111, and Brenham v. Bank, 144 U. S. 188, 12 S. C. R. 559.

In Brenham v. Bank, it is said after referring to the fact that the ordinance authorizing the bonds provided for redemption at any time after five years from date, and that the bonds were issued redeemable after ten years, "the officials of the city had no power to depart from the terms of the ordinance by varying the time limited for redemption."

It will be contended that the bonds are, nevertheless, valid in the hands of bona fide purchasers under the doctrine of estoppel by recital, even if they be invalid in the hands of others. Accepting the argument as to the Corkill commission bonds, it could, however, have no application to bonds exchanged for Canyon Canal obligations and still in

the hands of the original transferees. For, as stated in Leeman v. Perris, 74 Pac. 24-25, this principle (that of estoppel by recital) has no application where the purchaser has actual knowledge of a fact, which, taken in connection with the provisions of a statute which he is presumed to know, establishes the proposition that the statute has been violated.

> Wright v. East Riverside Irr. Dist., 138 Fed. 313;
> Anthony v. Jasper, 101 U. S. 693.

These transferees would therefore be charged with notice of the statutes of Idaho, both as to maturities of the bonds and as to the consideration for which they could be lawfully issued. As to the facts concerning the maturities, the bonds themselves bore date January 1st, 1911, and as the transferees received them direct from the depositary, not earlier than March, 1912 (p. 154 T.), they certainly knew that the maturities were not calculated from the date when they were issued and that they did not mature at periods required by law after issuance. As to the consideration, they certainly had knowledge as to what they were giving for them.

However, but little reliance can be placed on an argument in favor of the bona fide purchasers of the bonds, for the reason that no proof was offered whatsoever that any person other than the actual plaintiffs (excluding Thompson and Williams) were bona fide purchasers. And it was for the reason that the defendants wished to determine who were bona fide purchasers and who were not that the at-

tempt was made to have the other holders of bonds brought in as parties to the action.

DEFECT OF PARTIES.

Group two of the assignments of error, being specifications 6 to 11, inclusive, raises really two questions, much interwoven but distinct. The first is the refusal of the lower court to have additional parties brought in, pursuant to the plea of defect of parties in the answer (T. p. 56), and the motion made during the trial of the cause (Trans. pp. 186 and 210). The second is as to the validity of the decree adjudicating valid bonds and coupons held by persons not parties to the action. As to the first question, it is perhaps true that the other bondholders are not indispensable parties, but they are certainly necessary parties within the definition given in State of California v. Southern Pacific Co., 157 U. S. 250, 39 L. Ed. 691, 15 S. C. R. 591:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed 'necessary parties'; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting others not before the court, the latter are not indispensable parties."

Barney v. Baltimore, 6 Wall. 280, 18 L. Ed. 825;
Simpkins Suit in Equity, pp. 230-234.

As such the court could proceed without joining them, saving their rights, but will not under the generally recognized rule.

In State of California v. Southern Pacific Co., supra, the court quotes with approval from one Daniell Ch. Pl. & Prac., 4 Am. Ed., 190, as follows:

> " 'It is the constant aim of a court of equity to do complete justice, by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. For this purpose all persons materially interested in the subject ought generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill or notice of the decree, to have an opportunity afforded of making themselves active parties in the cause, if they should think fit.' "

Washington State Sugar Co. v. Sheppard, 186 Fed. 233-235.

Such is the evident intent of Equity Rule 39, saying:

> "In all cases where it shall appear to the court that persons, who might otherwise be deemed proper parties to the suit, can not be made parties by reason of their being out of the jurisdic-

tion of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

None of the exceptions stated in the rule as ground for omitting parties exist here, at least as to the larger part of the outstanding bonds. The committee maintaining this suit has under its absolute control $728,100.00 in amount (Tran. p. 185) of the total of $879,600.00 outstanding (Trans. p. 128), under a bondholders' agreement vesting even title to the bonds in the Committee and authorizing suit in their absolute discretion (Trans. pp. 183-184). It further appears by the evidence submitted by the actual plaintiffs (other than Thompson and Williams who made no proofs) that the entire holdings represented by name in the suit aggregated but $90,500.00, the following being a tabulation thereof:

Name.	*Transcript page.*	*Amount.*
Lincoln University	161	$ 5,000.00
Chester County Trust Co.	163	10,000.00
F. W. Horton	165	5,000.00
National Bank of Oxford	168	10,000.00
Mary C. Waddell	169	1,000.00
Charlotte H. Shipman	170	1,000.00
S. H. Hudson	171	2,000.00

Helen M. Conrad	172	2,000.00
J. Willis Gardner	174	7,000.00
A. N. Gaebler	177	47,500.00
Total		$90,500.00

It is apparent at a glance that the Committee used the names of but a few of the small holders, with the exception of the bonds belonging to Dr. Gaebler, a member of the Committee. It is of primary importance to the defendants in this suit to put the holder of bonds on his proof as to the conditions of his purchase and his standing as a bona fide holder. This can be done only by having them joined as parties. It is therefore submitted that the plaintiffs were entitled to the protection of having at least the other bondholders represented by the Committee joined in the action and that it was error for the court to proceed to decree without them.

This brings us to the second question, is the decree valid as to the bonds held by persons other than parties? It will be conceded, we think, that it is not, unless it can be sustained on the theory of representative or class suit, pursuant to the provisions of Equity Rule 38:

> "When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

One difficulty with this theory, however, is that the decree itself, (Trans. pp. 115-117) does not in terms purport to be such a decree. It is simply an adjudication that the bonds are valid, without reference to any holder, even the plaintiffs. But, assuming that such is the theory underlying it there are still a number of reasons why it should not be sustained.

One of them is the condition embodied in Equity Rule 38 itself, namely, that the persons constituting a class be so numerous as to make it impracticable to bring them all before the court, an exception that was thoroughly discussed by this court in In re Dennett, et al, 221 Fed., 350-355. As the evidence shows, it would have been anything but impracticable for the Committee to bring in at least the rest of the bonds held by themselves.

A second objection is that the suit is not brought by the plaintiffs in behalf of others similarly situated, but only in favor of all other holders of bonds of said district who may desire to join in this proceeding and pay their proper proportion of the costs herein (Trans. p. 24). There is neither allegation nor proof that there were any others *similarly* situated. Under such conditions, outstanding bondholders who did not connect themselves with the litigation in any way would certainly not be held to be bound by the decree were it adverse. It would seem to us to follow then that it could not be binding in their favor.

It is said by the Supreme Court of California in Haese v. Heitzeg, 114 Pac. 816-817:

"Where one plaintiff belonging to a numerous class, as creditors, bondholders, beneficiaries, and the like, brings an action in behalf of himself and all others similarly situted, the judgment which may be rendered is binding on others of the class who accept the representation, and who connect themselves with the litigation, either by coming into the suit or seeking to share in the fruits of the judgment, or by acquiescing in it. But it can have no binding effect on those who do not participate in the proceeding, do not make proof of their claims, or otherwise join in it." 23 Cyc. 1246; Pomeroy's Remedies, Par. 400; Ex parte Howard, 9 Wall. 175, 19 L. ed. 634; Holderman v. Hood, 70 Kan. 267, 78 Pac. 838."

Tobin v. Portland Flouring Mills Co., (Ore.) 68 Pac. 743;

Holderman v. Hood (Kan.) 78 Pac. 842;

Wabash Railway Co. v. College, 208 U. S. 38-57, 52 L. Ed., 379-387;

Compton v. Jessup, 68 Fed., 263-285.

ARE THE PLAINTIFFS, THOMPSON AND WILLIAMS, ENTITLED TO A DECREE?

Group one of the specifications of error present the question as to whether or not the plaintiffs Thompson and Williams were entitled to any relief (Specifications 1-4, inclusive). As appears from the original bill, (T. p. 7) J. Paul Thompson instituted this suit originally as sole plaintiff. Henry M. Williams was later joined as party plaintiff by order

of the court (T. p. 81). No evidence whatever was introduced at the trial of the cause nor any admission made in support of the allegations of the bill as to either Thompson or Williams. Interrogatories for discovery were submitted to both plaintiffs under Equity Rule 58 on August 17, 1916 (T. pp. 91-95) and neither plaintiff made any response (T. p. 211). It is contended that neither of these parties are entitled to share the benefits of any favorable decree, under the doctrine of class representation, or otherwise.

First, because the rule permitting class representation by a few is founded on necessity, and the practice should never be permitted where the parties could be easily before the court in name. In re Dennett, 221 Fed. 350-355 supra.

And, secondly, these parties having refused to answer the interrogatories, the bill as to them should have been dismissed with prejudice under the provisions of Equity Rule 58: "Any party failing or refusing to comply with such an order shall be liable to attachment and shall also be liable if a plaintiff to have his bill dismissed."

It will be noted that the actual making of the order for the examination of the plaintiffs pursuant to the rule was waived by plaintiffs' counsel by stipulation. (T. p. 95.)

Certainly these two plaintiffs, having refused to answer the interrogatories, cannot in lieu of being dismissed pursuant to the rule, be permitted to retire into the position of quasi parties and claim the benefit of a favorable decree.

It is therefore submitted that the decree should be reversed.

Respectfully,

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